

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

CONNECTU LLC,

Plaintiff,

v.

MARK ZUCKERBERG, EDUARDO SAVERIN,
DUSTIN MOSKOVITZ, ANDREW MCCOLLUM,
CHRISTOPHER HUGHES, and FACEBOOK, INC.,

Defendants.

Civil Action No. 1:04-cv-11923 (DPW)

District Judge Douglas P. Woodlock

Magistrate Judge Robert B. Collings

MARK ZUCKERBERG and
FACEBOOK, INC.,

Counterclaimants,

v.

CONNECTU LLC,

Counterdefendant,

and

CAMERON WINKLEVOSS, TYLER
WINKLEVOSS, and DIVYA NARENDRA,

Additional Counterdefendants.

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION TO STRIKE ADMISSIONS**

Defendants' are attempting to improperly use the admissions made in a completely separate litigation in California against Plaintiff and Counterclaim Defendants in the pending litigation. *See* Schoenfeld Declaration, Ex. 1, Defendants' Exhibit List Produced to Plaintiff on October 21, 2006. This is specifically prohibited by Rule 36(b) of the Federal Rules of Civil Procedure and California Code of Civil Procedure § 2033.410. Therefore, Plaintiff moves this Court to strike the Response of Defendant ConnectU LLC to First Set of Requests for Admissions (1-25) (listed as Exhibit 72A), the Amended Response of Defendant ConnectU LLC to First Set of Requests for Admissions (No. 2 only) (listed as Exhibit 72B), the Response of

Defendant Tyler Winklevoss to First Set of Requests for Admissions (1-25) (listed as Exhibit 73A), the Response of Defendant Cameron Winklevoss to First Set of Requests for Admissions (1-25) (listed as 74A), the Response of Defendant Divya Narendra to First Set of Requests for Admissions (1-25) (listed as 75A), all of which were made in Case No. 1:05-CV-047381 in the Superior Court of California.

Fed. R. Civ. P. 36(b) restricts the use of admissions made pursuant to Rule 36 to the pending action only and proscribes their use against the party in any other proceeding. For example, the United States Court of Claims rejected the use of admissions from one proceeding in another, stating that the “[p]laintiff has attempted to rely upon admissions filed in another action between these same two parties. . . . The Federal Rules of Civil Procedure (Rule 36(b)) which govern the admissions made in district court, like Court of Claims Rule 72(d)(4), provide that admissions are for purposes of the pending action only. Plaintiff’s attempt to make the admissions made in district court binding in this action is utterly devoid of merit.” *Kolar, Inc. v. United States*, 650 F.2d 256, 263 (Ct. Cl. 1981).

California Code of Civil Procedure § 2033.410(b) parallels the Federal Rule, providing that: “[n]otwithstanding subdivision (a), any admission made by a party under this section is binding only on that party and is made for the purpose of the pending action only. It is not an admission by that party for any other purposes, and it shall not be used in any manner against that party in any other proceeding.” *Shepard & Morgan v. Lee & Daniel, Inc.*, 643 P.2d 968 (Cal. 1982) (Cross-complaint and complaint are separate actions and therefore defendant’s admissions to plaintiff are not binding in the cross-complaint); *Smith v. Superior Court, In and For the County of Monterey*, 110 Cal.App.3d 422, 424-425 (Cal. App. Dep’t Super. Ct. 1980) (Admissions are not admissible as evidence in any other action).

In this case, all of the admissions were made in another litigation, in the Superior Court of California. Both the Federal and California Civil Procedure rules, by their clear language, forbid the introduction of these admissions as evidence in this proceeding.

Accordingly, Plaintiff respectfully requests that this motion to strike be granted.

Respectfully submitted,

DATED: October 23, 2006

/s/ John F. Hornick
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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on October 23, 2006.

/s/ John F. Hornick

John F. Hornick